


MOTIONS AND EXHIBITS

2017 APAAC Crash Reconstruction



MOTIONS

In Crash Cases



Motions For:

- Vehicular Homicide/Agg Assault
- Misdemeanor/Felony DUIs
- 28-672s
- Both Motion Responses & Pro-active Motions
- Some apply to all of these
- Others are charge/case specific
- List is not all inclusive

PRO-ACTIVE TACTICAL MOTIONS

Be Pro-active

- Review the case for potential motions in limine
- Anticipate attempted defense ploys we should preclude
- This includes your trial notebook
 - Include quick legal references

Preclude Evidence of Victim's BAC/Drug Use

- Not relevant – Rule 401
- *State v. Krantz*, 174 Ariz. 211 (1993), evidence of meth in V's system precluded as irrelevant
- Rules 402, 403, 103(d)
- May want to include the presumptions if V's BAC is low
- File when there is no evidence the victim contributed to the crash (always OK for § 28-672 cases).

Introduce Defendant's Other Acts Under Rule 404(B)

[Agg assault & vehicular homicide cases]

- Relevant to show Defendant was aware of the recklessness & risk caused by DUI.
- *State v. Woody*, 173 Ariz. 561 (App. 1992).
- *US. v. Fleming*, 739 F.2d 945 (4th Cir. 1984).

Preclude Defendant's Injuries After the Crash

- Mainly filed in general DUI cases
- Not relevant unless did FSTs, etc.— Rule 401
- Rules 402, 403, 103(d)

Substitute Expert

- An expert can give **his/her opinion** regarding test results using a nontestifying witness's notes, reports, etc., as a basis for that opinion.
- It's the testifying expert's opinion.
- Not required to prove first expert's qualifications.

Case Law Is Clear - We Can Do This

- *State v. Karp* (Voris RPI) 236 Ariz. 120 (App. 2014).
- *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014).
- *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997).
- *State v. Joseph*, 230 Ariz. 296, 282 P.2d 27 (2012).
- *State v. Smith*, 215 Ariz. 221, 229, 159 P.3d 531 (2007).
- *State v. Tucker*, 215 Ariz. 298, 160 Ariz. 177 (2007).
- *State v. Dixon*, 226 Ariz. 545, 250 P.3d 226 (2011).
- *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010).

STATE'S PROACTIVE § 28-672 MOTIONS/ISSUES

NEW OPINION!!!

- ARS § 28-672 is a strict liability offense
- It is not jury eligible

Phoenix City Prosecutor's Office v. Nyquist (Hernandez-Alejandro, RPI) | CA-CV 16-1070.

28-672(G) – Restitution Cap

- Statute has a \$10,000 Restitution Cap
- **Unconstitutional** – violates victim's rights
- Ariz. Const. Art 2 Section 2.1(A)(8) gives the victim the right to receive restitution without limit.

28-672(G) – Restitution Cap

- *Roscoe*, 185 Ariz. 68 (1996) & *Simpson*, 214 Ariz. 205 (App. 2007) found other statutes unconstitutional for conflicting with VBR.
- McClennen minute entry

SOMEWHAT COMMON DEFENSE MOTIONS

Defense Motion to Preclude State's Expert Testimony on Effects of Alcohol

Defense relies on opinions like *Salazar* and *Hicks*.

- First degree murder cases where court prohibited testimony that alcohol intoxication negated mental state.

Defense Motion to Preclude State's Expert Testimony on Effects of Alcohol (cont.)

- Experts can testify to alcohol's affects & all impaired at .08. *DeWolf*, 152 Ariz. 327 (App. 1986).
- A.R.S. 28-1381(H) - the presumptions do not limit "the introduction of any other competent evidence bearing on the question of whether or not the defendant was under the influence of intoxicating liquor."

Motion to Dismiss or Give *Willits* Instruction – State no longer has the vehicle(s)

- Police almost always attempt to contact the defendant
 - Relate efforts; defendant's absence, etc.
- Other evidence exists – photos, measurements, diagrams, etc.

Motion to Dismiss For Failing to Keep Vehicle(s)

- Defense will assert due process violation for destruction of evidence
- 3 part test:
 1. Was evidence material to guilt/punishment
 2. Was defendant prejudiced
 3. Did the government act in good faith
- Show police acted in good faith; (prejudice is lacking)

Request for Willits Instruction For Failing to Keep Vehicle(s)

- Willits instruction not automatic even if evidence is destroyed.
- Defendant must show:
 1. State failed to preserve evidence having an obvious tendency to exonerate him/her
 2. Defendant was prejudiced (could not obtain comparable evidence by other reasonable means, Murray, 184 Ariz. 9 (1995).
- Bolton, 182 Ariz. 290 (1995); Tinajero, 188 Ariz. 350 (App. 1997);

Pre-trial Motions To Dismiss

- Not Allowed if Address Factual Sufficiency
- Summary Judgment is Not Allowed in Criminal Cases.

State v. Rickhard-Hughes, 182 Ariz. 273 (App. 1995).

Preclude Defendant's Admission For Lack of *Corpus Delicti*

(Non-injury DUIs)

Corpus Delicti Rule

Before Defendant's incriminating statement comes in at trial, the State must show:

- 1) a reasonable inference that
- 2) a crime was committed by some person.

State v. Gillies, 135 Ariz. 500, 506 (App. 1983).

DUI *Corpus* Cases

- Circumstantial & independent evidence corroborated defendant's admissions to drinking & driving (so held *corpus* rule inapplicable).
 - Defendant found in home near crash scene
 - Visibly intoxicated
 - Nature of crash suggested impaired driving
 - Girlfriend said defendant just arrived home and sometimes drives the truck
 - She removed defendant's property from the truck before it was towed

State v. Gill, 234 Ariz. 186 (App. 2014).

DUI Corpus Cases

State ex rel. McDougall v. Superior Court (Plummer, RPI), 188 Ariz. 147 (App. 1996). **(Officer observed impaired driving. Both potential drivers were drunk – sufficient evidence that some person committed the crime of DUI.)**

DUI Corpus Cases

State v. Villa, 179 Ariz. 486 (App. 1994).

- ☐ Felony DUI - Drivers presentation of ID card & inability to produce license when request was repeated, supported inference license was suspended.
- ☐ Because State presented enough evidence of underlying DUI charge, it was not required to present independent evidence of suspension as it only raises offense to a higher degree.

CORPUS Statute

A.R.S. § 28-1388 (G):

A statement by the defendant that the defendant was driving a vehicle that was involved in an accident resulting in injury to or death of any person is admissible in any criminal proceeding without further proof of *corpus delicti* if it is otherwise admissible.



EVIDENCE RULE 104(A)

“Courts must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by the Rules of Evidence, except those on privileges.”

Hearsay should be admissible in a *corpus* hearing

Don't Forget the DUI/Impairment Issues

- Preclude micro clot issues; hanging drop,
- Partition ration not relevant for (A)(1) [breathing pattern]
- Preclude self-serving hearsay
- Necessity
- Facts used just for sympathy
- Irrelevant COBRA/blood test evid. from other cases
- Batch data from other blood runs
- Issues from other places (Scottsdale lab)
- Intent/strict liability issues (sleep driving, APC, etc.)
- Hematocrit, bariatric surgery, high levels of zinc
- Officer under investigation
- Admit PBT Refusal
- Keen
- Harris & Havens
- 911 Recordings/Dispatch
- Breath Test with Calibrations > 30 Days Apart
- Deprivation Period

PREPARING EXHIBITS

When Considering Exhibits Remember There Are Multiple Crime Scenes

- Entire crash site
 - Collision
 - Vehicle recovery
- Vehicles
- Occupants
- Defendant
- Hospital
- Medical Examiner
- Personal property
- (Defendant's history)
- Bar

Have a Plan

- What exhibits are you going to use?
 - Be sure they further your theory of the case
- Who going to admit them with
 - Make a list for each witness
- How will you authenticate & admit them
- Be sure to meet disclosure requirements
 - Don't forget your experts

Have a Plan

- Meet with/prepare witnesses
- Evaluate/anticipate the defense plan
- Anticipate objections
 - Motion in limine
 - Do you have an alternative

Anticipate Objections

- Common Objections
 - Lack of Foundation
 - Hearsay (documents)
 - Authentication
 - Chain of Custody
 - Prejudicial, Rule 403
 - gruesome photos
 - Improper Demonstration
 - Rule 702
 - Experts
 - animations

Do We need to Create More Exhibits?

Prepare

- Meet with crash reconstructionist
 - What photos would he/she use
 - Why
 - Put them in order that tells the story
 - Create diagrams
- Have witnesses view/listen to prior to trial
- Consider a Pretrial Defense Meeting with Defense Counsel
 - Stipulation
 - Discovery

Get Organized

- Have exhibits ready prior to calling the witness if possible-don't make jury wait.
- May want to group photos to quicken admission
 - But address each individually
 - Know exhibit numbers
- Case Agent unseal evidence with defense to avoid any chain of custody issues.

Demonstrate

What About Gruesome Photos?

Proceed with Caution!

Don't Forget Impairment

Thank You!

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